



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Chief Master Sergeant Gerald E. Ohr, USAF

**File:** B-233089

**Date:** August 31, 1989

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### **DIGESTS**

1. Military retired pay is adjusted to reflect cost-of-living increases rather than changes in active duty pay rates, and as a result service members who remained on active duty after becoming eligible for retirement were receiving less retired pay when they eventually retired than they would have received if they had retired earlier. Subsection 1401a(f), title 10, U.S. Code, was adopted to alleviate that problem, and it authorizes an alternate method of calculating retired pay based not on a service member's actual retirement but rather on his earlier eligibility for retirement.
2. Members of the armed services, whether officer or enlisted, who have not met the requirements prescribed by statute and regulation of time-in-grade for retirement in a certain grade may not have their retired pay computed on the basis of the higher grade through operation of 10 U.S.C. § 1401a(f) unless a waiver of that requirement has been granted pursuant to proper authority.
3. Time-in-grade restrictions must be satisfied by a service member in the establishment of the hypothetical retirement date to be used for purposes of the alternate computation of military retired pay authorized under 10 U.S.C. § 1401a(f).
4. Ordinarily, an original interpretation of a statute must be applied back to the time of enactment of the law. However, prospective application may be given to a decision which is inconsistent with a reasonable administrative determination which would result in collection action against retired members for erroneous payments of retired pay. The computation of retired pay for those members affected should be adjusted for future payments.

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## DECISION

This action is in response to questions submitted by the Principal Deputy Assistant Secretary of Defense (Comptroller) with comments and analysis provided in Department of Defense Military Pay and Allowance Committee Action No. 563 concerning the application of 10 U.S.C. § 1401a(f). One question involves a member who is reduced in grade after he has met the statutory requirements for retirement in a higher grade, but has not met the administrative time-in-grade requirements to retire at the higher grade. We are also asked whether 10 U.S.C. § 1401a(f) would affect an officer who retires while serving in a particular grade but who has not met the statutory time-in-grade requirements. Finally, we are asked if the application of 10 U.S.C. § 1401a(f) does not permit the member who was reduced in grade to compute his retirement on the basis of the higher grade, should that determination be applied retroactively to those members whose retired pay is being computed on the basis of a higher grade in which they served but did not meet the time-in-grade requirements for retirement. For the following reasons it is our view that 10 U.S.C. § 1401a(f) applies only in cases where a member has met the statutory and administrative time-in-grade requirements for retirement in that grade. It is also our view that this decision should have prospective effect only.

## BACKGROUND

Gerald E. Ohr was, immediately prior to November 17, 1986, serving in the grade of chief master sergeant (E-9). At the time of his promotion to E-9, he incurred an obligation to remain on active duty for 2 years. Effective November 17, 1986, Sergeant Ohr was reduced in grade to E-8. At that time he had not served in the E-9 grade for the required 2 years. He was retired in the grade of E-8 under 10 U.S.C. § 8914. His retired pay, however, is presently being computed based on the higher grade of chief master sergeant under the provisions of 10 U.S.C. § 1401a(f). That section provides in pertinent part as follows:

"Notwithstanding any other provision of law, the monthly retired pay of a member or a former member of an armed force who initially became entitled to that pay on or after January 1, 1971, may not be less than the monthly retired pay to which he would be entitled if he had become entitled to retired pay at an earlier date, adjusted to reflect any applicable increases in

such pay under this section. In computing the amount of retired pay to which such a member would have been entitled on that earlier date, the computation shall be based on his grade, length of service, and the rate of basic pay applicable to him at that time. . . ."

The purpose of the above quoted provision, which is commonly referred to as the Tower Amendment, was to remove the pay inversion problem that had existed because upward cost of living adjustments of retired pay had for several years been in greater amounts and at greater frequency than increases in active duty basic pay. As a result, many members who remained on active duty after becoming eligible for retirement were losing considerable retired pay. The Tower Amendment was designed to alleviate this problem. Thus, where the member's retired pay based on the actual date of retirement is less than the retired pay would be based on an earlier retirement date, the member's retired pay may be calculated based on the earlier date, as adjusted by cost of living increases to which the member would have been entitled.

We have held that the Tower Amendment authorizes computation of retired pay on the basis of a higher grade where a member has been reduced in grade for substandard performance of duty or because of non-judicial punishment and retired in the lower grade. See 56 Comp. Gen. 740 (1977). The same result was reached in the case of a member reduced in grade by sentence of a court-martial. See 66 Comp. Gen. 425 (1987). The law was amended subsequent to that decision to preclude application in cases where a reduction in grade was ordered by a court-martial. See Pub. L. No. 100-456 § 622, Sept. 29, 1988, 102 Stat. 1983.

On the basis of our decision at 56 Comp. Gen. 740 the Air Force has been applying the Tower Amendment in cases involving a reduction in grade to compute the member's retired pay on the basis of the higher grade he held prior to the reduction in grade. The Tower Amendment has been applied even if the member has not met the administrative requirements for time-in-grade in order to be eligible to retire.

In our earlier Tower Amendment decisions, the issue of whether the members had met the administrative requirements for retirement was not raised. However, in those cases we assumed that the members were eligible to receive retired or retainer pay and had met all the requirements.

In this regard, as discussed below, we think it is clear that the statute only contemplates situations where a member has met all the requirements necessary to become entitled to retired pay at an earlier date but chose not to retire and to remain on active duty.

Retirement of enlisted members of the Air Force with more than 20 years of service but less than 30 years is governed by 10 U.S.C. § 8914. That section provides in part as follows:

"Under regulations to be prescribed by the Secretary of the Air Force, an enlisted member of the Air Force who has at least 20, but less than 30, years of service computed under section 8925 of this title may upon his request be retired. . . ."

Regulations promulgated pursuant to this statutory authority are contained in AFR 35-7, entitled "Service Retirements." Paragraph 3-1 of the regulation provides that to be eligible for voluntary retirement in an officer or enlisted status, a member must have completed at least 20 years of active military service. In addition, unless a waiver is granted or the member is entitled to retire in a higher grade, the time-in-grade requirements must be met. The time-in-grade requirements for retirement are based on active duty service agreements entered into to by the member when he is promoted. Under AFR 39-18 an enlisted member who accepts a promotion to E-7, E-8, or E-9 must enter into an active duty service agreement of 2 years. Waiver of this requirement is authorized for hardship or where it would be in the best interests of the Air Force.

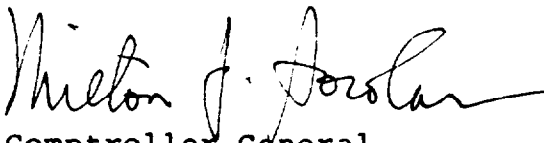
It is settled that regulations promulgated pursuant to statutory authority have the force and effect of law. See 53 Comp. Gen. 364, 366 (1973). Thus, an enlisted member who does not meet the requirements of the regulations promulgated under 10 U.S.C. § 8914 or other similar time-in-grade regulations has not met the requirements to become entitled to retired pay in a certain grade. To conclude otherwise would render the words of the statute "under regulations" meaningless. Accordingly, a member may not be considered as entitled to retired pay at an earlier date pursuant to 10 U.S.C. § 1401a(f) unless he has met both statutory and regulatory entitlement requirements. Sergeant Ohr, therefore, is not entitled to have his retired pay computed on the basis of grade E-9 because he did not serve for 2 years in that grade.

We are also asked whether a commissioned officer who has not met the statutory time-in-grade requirements for retirement in a certain higher grade is entitled to compute his retired pay on that higher grade under 10 U.S.C. § 1401a(f). It is noted in the committee action that 10 U.S.C. § 1370(a)(2) provides that an officer in the grade of O-5 through O-8 must have served on active duty in that grade for at least 3 years in order to be eligible to voluntarily retire in that grade. The President may waive this requirement in individual cases involving extreme hardship or exceptional or unusual circumstances.

As we stated earlier, we think that the Tower Amendment contemplates situations where a member has met all the requirements necessary to become entitled to retired pay at an earlier date but chose not to retire and to remain on active duty. In the example listed above, an officer could not be retired voluntarily in a grade that he had not served in for at least 3 years. Therefore, he would not be entitled to retired pay at an earlier date in a certain grade under 10 U.S.C. § 1401a(f) unless he had met the statutory time-in-grade requirement.

The questions presented here with regard to 10 U.S.C. § 1401a(f) have not been previously considered by this Office. Ordinarily, an original construction of a statute applies retroactively to the date that the statute first went into effect. 63 Comp. Gen. 301 (1984). However, exceptions to this rule have been made and we have given prospective effect to some decisions when the results have been contrary to longstanding administrative decisions by those responsible for implementing a statute. The purpose for prospective application of these decisions was to preclude collection action against individuals who had received payments from the government on the basis of the determinations inconsistent with the decision. 54 Comp. Gen. 890 (1950); 24 Comp. Gen. 688 (1945) and Matter of Kornreich, B-170589, Aug. 8, 1974.

In this case we view the Air Force's interpretation as reasonable, and therefore collection action against individuals who received payments in accordance with the Air Force interpretation need not be taken. However, recomputation of the retired pay of those members affected should be made for the future.

*for*   
Comptroller General  
of the United States